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The Sedona Principles (Third Edition): Continuity, Innovation, and Course Corrections

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Recommended Citation

Allman, Thomas Y. (2017) "The Sedona Principles (Third Edition): Continuity, Innovation, and Course Corrections," *Akron Law Review*: Vol. 51 : Iss. 3 , Article 10.

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THE SEDONA PRINCIPLES (THIRD EDITION): CONTINUITY, INNOVATION, AND COURSE CORRECTIONS

*Thomas Y. Allman**

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I. INTRODUCTION

The *Sedona Conference Principles (Principles)*, the signature work product of Working Group One (WG1) of the Sedona Conference,¹ provide best practice recommendations for discovery of electronically stored information (ESI). The *Principles* have been widely accepted by courts and parties alike as authoritative because they provide carefully balanced treatment of core issues and are helpful in avoiding and resolving disputes.²

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1. The Sedona Conference is a nonprofit 501(c)(3) research and education group consisting of experienced jurists, lawyers, and consultants dedicated to providing leadership in areas of antitrust law, complex litigation, and intellectual property rights.

2. See, e.g., *Morgan Hill Concerned Parents v. Calif. Dep't of Educ.*, No. 2:11-CV-3471 KJM AC, 2017 WL 445722, at *5 (E.D. Cal. Feb. 2, 2017) (relying also on the Sedona Glossary, an equally iconic Sedona Conference publication).

A Third Edition of the *Principles* was released in final form in October 2017 and is the subject of this Article.³ Like the Second Edition published in 2007, which reflected the impact of the 2006 e-discovery amendments, the Third Edition channels the 2015 amendments to the Federal Rules of Civil Procedure (Federal Rules).⁴ The Sedona Conference participated in that extensive rule-making process and made important contributions to it, while also developing the Third Edition of the *Principles*.

II. THE THIRD EDITION

As the Introduction to the Third Edition of the *Principles* puts it, “[n]ew issues and technologies—some not even fathomed in 2007—now command our attention” and in and of themselves justify updates to the Second Edition.⁵ The multi-year drafting effort was guided by a determination to do no harm to existing *Principles* and Commentary, which had proven their value while, at the same time, dealing with the fact that “some sections [of the *Principles* and Commentary in the 2007 Edition] had not aged well.”⁶

The Foreword to the *Principles* traces the evolution of the Third Edition from the time of the first drafting efforts in 2010 through the narrowing of issues and adoption of the post-comment final revisions by the WG1 Steering Committee in September 2017.⁷ Ultimately, while Principle 6 remained unchanged, Principles 5, 8, 13, and 14 underwent substantial revisions in reaction to the renewed emphasis on proportionality and the more comprehensive approach to spoliation of ESI adopted in the 2015 Amendments.⁸ In addition, Principle 12 has been substantially revised to reflect best practices in selecting a form or forms of production. The Third Edition also breaks new ground in advocating

3. The Sedona Conference, *The Sedona Conference Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1 (2018) [hereinafter *The Sedona Principles*]. For the convenience of the reader, the Third Edition of the *Sedona Principles* are reproduced in Appendix A.

4. See Proposed Amendments to the Federal Rules of Civil Procedure 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84 and the Appendix Forms, Absent Contrary Congressional Action, 305 F.R.D. 457 (2015) [hereinafter *The Proposed Rules*].

5. *The Sedona Principles*, *supra* note 3, at 28-29 (noting the explosion of Facebook, Twitter, mobile apps, big data analytics, and cloud computing, not to mention new methods of search, retrieval, and review methods in the form of TAR).

6. *Id.* at 32-33.

7. *Id.* at 12-16.

8. For a useful summary of differences from the Second Edition, see the Overview of Main Changes Between the Second and Third Edition. *Id.* at 35-50.

for a more holistic use of Information Governance (IG) and in its practical advice on the use of FRE 502.

A particular strength of the Third Edition lies in its Commentaries, most of which have been extensively revised to enhance their practicality and ease of use. This reflects the Sedona Conference's success in developing a consensus approach to dealing with strongly held competing points of view among the members of WG1.

III. JUDICIAL RESTRAINT

Principle 6 famously provides that a responding party is “best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.”⁹ The Sedona Conference's commitment to this bedrock principle of judicial restraint, proposed at the first meeting of what became WG1,¹⁰ remains unchanged and has important implications for the Third Edition.

A. *Case Management*

The Rules Enabling Act does not authorize enactment of procedural rules or ad hoc judicial action that unduly interferes with the substantive right of parties to manage their primary conduct.¹¹ There is only “narrowly circumscribed” authority for courts to intervene in pretrial discovery decisions by parties in compliance with their obligations.¹²

As former Judge Francis put it in a prescient article on the topic, “[j]udges need to be sensitive to the legal boundaries of their authority

9. Principle 6 was issued for public comment in March 2003 and, as unchanged, was included in the First Edition issued in January 2004. It was unchanged in the Second Edition.

10. The author also suggested its use to the Federal Rules Advisory Committee, which was then soliciting comments for what ultimately became the 2006 Amendments. *See, e.g.*, Letter from Thomas Y. Allman to Peter McCabe, Secretary, Committee on Rules of Practice and Procedure, (Dec. 9, 2002) (“The producing party should determine the best and most reasonable approach to locating and producing relevant electronic information during discovery.”) (copy of letter on file with author).

11. Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 567 (2001) (“Another problem with the [judicial] managerial model is that . . . it lessens predictability for litigants, who therefore may be hampered significantly in their efforts to plan their primary behavior.”).

12. J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail, 542 F.2d 1318 (7th Cir. 1976) (refusing to compel parties to stipulate to facts to which they will not voluntarily agree); *see also* Olin Guy Wellborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371, 404-05 (1977) (“[It risks improperly] affect[ing] behavior at the planning as distinguished from the disputative stage of activity.”).

[and] the practical limits of their expertise.”¹³ Accordingly, Principle 6 rejects an unnecessarily intrusive juridical approach when electronic discovery is involved. As Comment 6.a. in the Third Edition succinctly puts it, “a responding party should determine how to meet its own preservation and production obligations.”¹⁴

Comment 6.a. explains that satisfying electronic discovery obligations requires a very specific understanding of how information is handled by an entity.¹⁵ Neither courts nor opposing parties are typically so equipped. Rule 26(g) provides ample means to deal with those entities that do not act in good faith to meet their discovery obligations.

The need for appropriate judicial restraint has been recognized by many courts applying Principle 6.¹⁶ *The Commentary on Defense of Process* summed it up well by explaining that it is “the producing party’s prerogative and responsibility to decide the procedures, methodologies, and technologies to use, and to live with the consequences of those decisions.”¹⁷

B. Cooperation

Rule 1 was amended in 2015 to make both courts *and parties* responsible for securing the just, speedy, and inexpensive determination of each case. The Committee “seriously considered” but ultimately refused to amend Rule 1 to require that parties “should cooperate to achieve these ends.”¹⁸ Among the reasons was uncertainty as to whether a duty to cooperate included a mandate to compromise.¹⁹ The Committee Note observes that “most lawyers and parties cooperate to achieve [the goals of Rule 1]” and that “[e]ffective advocacy is consistent with—and indeed depends upon—cooperative and proportional use of procedure.”²⁰ It also eschews use of the amended rule as a new or independent basis for sanctions.

13. James C. Francis IV, *Judicial Modesty: Not an Oxymoron; The Case for Restraint in the Electronic Age*, LEGAL TECH NEWS (Feb. 1, 2013).

14. *The Sedona Principles*, *supra* note 3, at 118.

15. *Id.*

16. *See id.* at 120 n.97 (listing cases that support this proposition).

17. The Sedona Conference, *The Sedona Conference Commentary on Defense of Process: Principles and Guidelines for Developing and Implementing a Sound E-Discovery Process* (Public Comment Version Sept. 2016), at 13.

18. Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 16 SEDONA CONF. J. 1, 7 (2015); *see also id.* at 9 (citing Duke Subcomm. Initial Sketch for Rule 1).

19. *Id.* at 6-8 (citing Steven S. Gensler, *Some Thoughts on the Lawyer’s Evolving Duties in Discovery*, 36 N. KY. L. REV. 521, 546 (2009)).

20. The Proposed Rules, *supra* note 4, at 532-33.

The Third Edition reconciles support for Principle 6 with promotion of cooperative behavior, as championed by the aspirational 2008 Sedona Conference *Cooperation Proclamation*,²¹ by emphasizing the benefits of voluntary conduct. Comment 3.b. notes, for example, that cooperation among counsel “can enhance the meet and confer process” and foster the overriding objective of Rule 1.²² It describes that type of cooperation as “fundamentally a voluntary endeavor” with a “relatively equal and balanced exchange of non-protected information.”²³

Comment 6.b. suggests that an election to cooperate in meaningful ways on procedures can achieve monetary savings and non-monetary efficiencies.²⁴ Comment 11.a. notes that parties should be prepared to discuss their choices of search methods, especially if there are perceived deficiencies.²⁵

Courts acknowledge the limits on judicial compulsion of cooperation.²⁶ In *Hyles v. New York*, the court concluded that “[c]ooperation principles” do not “give the requesting party, or the Court, the power to force cooperation or to force the responding party to use [a particular form of computer assisted search].”²⁷

In response to public comments suggesting that the discussion of cooperation in Comment 6.b. was inadequately balanced, the Drafting Team added the observation that parties who refuse to participate in the discovery process may weaken their ability to later challenge that process.²⁸

C. *Discovery on Discovery*

Comment 6.b. emphasizes that “as a general matter,” there should be no “discovery on discovery” absent agreement between the parties or

21. The Sedona Conference, *Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009 Supp.); see also *The Sedona Principles*, *supra* note 3, at 76-78 cmt. 3.b (providing a summary of its adoption in 2008 and its impact after the 2015 Amendments).

22. *The Sedona Principles*, *supra* note 3, at 76.

23. *Id.* at 77 (“[Attorneys] should advocate their client’s positions within the parameters of the applicable rules.”); see also *id.* at 85 cmt. 3.g. (suggesting that communications with opposing counsel and courts should be “informed and candid”).

24. *Id.* at 123.

25. *Id.* at 165.

26. *Searcy v. Esurance*, No. 2:15-cv-00047-APG-NJK, 2016 WL 4149964, at *2 (D. Nev. Aug. 1, 2016) (describing the amendment to Rule 1 as effort to change legal culture).

27. *Hyles v. New York City*, 10 Civ. 3119 (AT) (AJP), 2016 WL 4077114, at *2 (S.D.N.Y. Aug. 1, 2016).

28. *Cover Letter to the Sedona Principles, Third Edition*, SEDONA CONF., 3 (2017), <https://thesedonaconference.org/publication/The%20Sedona%20Principles> [http://perma.cc/RTA2-JNJZ].

specific indicia of a material failure by a party to meet its obligations.²⁹ This view provoked a strong response from a member of the judiciary who served as an observer and participant in WG1.³⁰

The Foreword to the Third Edition of the *Principles* acknowledges the particular difficulty in arriving at a consensus on the language in the Comment given the strongly-held views presented by members who predominantly represented opposing sides in large-scale, asymmetrical litigation.³¹

D. Direct Access

Comment 6.d. cautions against granting direct access to electronic systems unless the operation of the system is at issue in the case³² and Comment 10.e. suggests that it should be done only after a showing of good cause.³³ It notes that court-ordered inspections present difficult issues and should be used sparingly because of concerns about disclosure of protected information.³⁴ The Comment also suggests that inspections should be narrowly tailored to the circumstances and accompanied by strong protective orders.³⁵ As noted in Comment 8.c., because the costs and burdens involved are substantial, early discussion of alternative approaches can be useful.³⁶

IV. INFORMATION GOVERNANCE

The Third Edition advocates for a holistic view of electronic discovery planning and suggests that it would benefit from being part of a comprehensive IG approach to management of information.

A. Background

The importance of IG programs in the litigation context has increased because of the explosive growth in the volumes and diversity of electronic

29. *Id.* at 123.

30. Hon. Craig B. Shaffer, *Deconstructing "Discovery About Discovery,"* 19 SEDONA CONF. J. 215, 225 (2018) ("A judge must guard against unilaterally usurping the discovery process or delving into technical areas beyond their control or expertise. But a court would be equally remiss in summarily rejecting a pretrial dispute as nothing more than an immaterial discussion about 'discovery about discovery.'").

31. *The Sedona Principles*, *supra* note 3, at 14.

32. *Id.* at 127.

33. *Id.* at 152.

34. *Id.* at 152-53.

35. *Id.*

36. *Id.* at 140-42.

information types subject to discovery.³⁷ The risk is that an uncoordinated “silo” approach to dealing with discovery of such information may exacerbate, not mitigate, the costs and burdens involved.

The *Principles* suggest that organizations facing this new paradigm should be open to the use of IG programs. It envisions a “coordinated, inter-disciplinary approach” to address records and information management, data privacy, information security and protection, compliance, data governance, data storage and archiving, and electronic discovery.³⁸

B. Principle 1

The Introduction to Principle 1, which deals with ESI generally,³⁹ emphasizes that while discovery of relevant ESI is subject to the same preservation and production requirements as other forms of information, its use is “so pervasive” that it is often the driving force behind the adoption of IG programs.⁴⁰

Comment 1.a. explains that organizations “can benefit” greatly from effective “information governance programs that reduce the cost and risk of meeting discovery obligations.”⁴¹ Comment 1.b., relying on the *Commentary on Information Governance*,⁴² suggests that there is often a “direct correlation” between the use of an IG program and “the ease with which [an entity] can search, identify and produce information.”⁴³

The *Commentary on Information Governance* suggests an IG program will enable decisions about information for the good of the overall organization to be consistent with senior management’s strategic directions. This contrasts with the typical “siloed approaches” to managing information.⁴⁴

37. *Id.* at 8.

38. *Id.* at 59.

39. *Id.* at 56.

40. *Id.*

41. *See id.* at 59 cmt. 1.a. The author admits to a certain concern about the ease of achieving such goals, given personal experience as a General Counsel seeking to coordinate such efforts from a legal perspective.

42. The Sedona Conference, *Commentary on Information Governance*, 15 SEDONA CONF. J. 125 (2014).

43. *The Sedona Principles*, *supra* note 3, at 60 cmt. 1.b.

44. *Cf.* The Sedona Conference, *Commentary on Email Management: Guidelines for the Selection of Retention Policy*, 8 SEDONA CONF. J. 239 (2007). As noted in that Commentary, a consensus on specific best practices was virtually impossible to achieve given the diversity of approaches in play then (and over time) among organizations represented by the drafting team members.

Comment 1.b. suggests practical considerations for dealing with records schedules, disposing of ESI that “no longer needs to be retained or preserved,” adjusting the “rotation cycle for backups,” and “limit[ing] the size of email accounts.”⁴⁵ It also cautions that new technology should not be adopted without considering the difficulty to preserve and produce ESI for litigation.⁴⁶

The Comment also notes, however, that “despite the compelling logic of IG for many organizations, adopting such a program is neither a legal nor a business imperative.”⁴⁷ Accordingly, an organization’s compliance with discovery obligations should not be judged by the state or lack of an IG program.⁴⁸

C. Principle 5

Comment 5.b. suggests that an effective IG program can “substantially enhance” the ability to address electronic discovery issues.⁴⁹ Even a “modestly mature IG program” typically develops indices of its core information systems and applications—including key metadata fields, system stewards, and an inventory of legal holds—and whether information relevant to one matter is being preserved for another.⁵⁰

The Comment explains that having “defined policies and procedures for issuing and monitoring legal hold notices” and training on the policies and procedures is appropriate.⁵¹ Comment 5.c. and 5.d. emphasize the role of “legal hold” notices to preserve relevant information, relying on the *Commentary on Legal Holds: The Trigger and the Process*.⁵²

V. PROPORTIONAL DISCOVERY

The emphasis on proportionality reflected in the 2015 Amendments is addressed “expressly and liberally” throughout the Third Edition from

45. *The Sedona Principles*, *supra* note 3, at 59-64 cmt. 1.b.

46. *Id.* at 62-63.

47. *Id.* at 61.

48. *Id.*; *accord* at 99-100 cmt. 1.b.

49. *Id.* at 99.

50. *Id.* at 98-99.

51. *Id.* at 100.

52. *Id.* at 101-08; *see also* The Sedona Conference, *Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265, 280-82 (2010) [hereinafter *Commentary on Legal Holds*]. The Drafting Team Cover Letter explains their refusal to include “detailed advice on how to meet preservation obligations” and the related suggestion that “readers should turn to the *Commentary on Legal Holds: The Trigger & the Process* for more specific guidance.” *Cover Letter to the Sedona Principles, Third Edition*, *supra* note 28, at 2.

preservation through production.⁵³ This is especially evident in amended Principles 2, 5, 8, 11, 12, and 13 and their respective Commentaries, as discussed below.

A. Background

While limitations on “disproportionate” discovery in the Federal Rules date back to 1983, the language capturing the essence of “proportionality” was tucked away in Rule 26(b)(2)(C)(iii) until it was moved into Rule 26(b)(1) as part of the 2015 amendment, as revised and augmented by a new factor suggested by public comments. Rule 26(b)(1) now requires that discovery must be *both* relevant to a party’s claim or defense and “proportional to the needs of the case” while taking into consideration proportionality factors.⁵⁴

This has had a major and salutary impact. As Chief Justice Roberts noted in his 2015 year-end report, the 2015 Amendments have “crystallized the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.”⁵⁵ One unintended consequence, however, is a diminution in the need to reference Rule 26(b)(2)(B) in order to invoke proportionality objections when ESI is sought from inaccessible sources.⁵⁶ Not surprisingly, courts increasingly turn to Rule 26(b)(1) for proportionality considerations rather than dealing with the necessity of first making findings of inaccessibility and “good cause.”⁵⁷

The Third Edition of the *Principles* has been careful to leave room for both approaches, but appears to be particularly supportive of the reliance on Rule 26(b)(1), which is, obviously, quite logical.⁵⁸ The 2017 Edition of the *Commentary on Proportionality* disclaims any intent to

53. *The Sedona Principles*, *supra* note 3, at 32.

54. FED. R. CIV. P. 26(b)(1) (emphasis added).

55. Chief Justice Roberts, *2015 Year-End Report on the Federal Judiciary*, 6 (Dec. 31, 2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [http://perma.cc/JK7G-FDF3].

56. FED. R. CIV. P. 26(b)(2)(B) (limiting the production of ESI from inaccessible sources absent a showing of “good cause considering the limitations of Rule 26(b)(2)(C).”). As amended in 2015, FED. R. CIV. P. 26(b)(2)(C)(iii) provides a cross-reference to the revised proportionality factors by noting that the court must limit discovery if it determines that “the proposed discovery is outside the scope permitted by Rule 26(b)(1).” Subsections (i) and (ii) remain unchanged.

57. *See, e.g., Archer Daniels Midland Co. v. Chemoil Corp.*, No. 15-2199, 2016 WL 9051173 (C.D. Ill. Oct. 19, 2016).

58. Thomas Y. Allman, *The “Two-Tiered” Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?* 14 Rich. J.L. & Tech, 7, *2 (2008) (“Whether a source is ‘reasonably accessible’ or not, the ‘proportionality principle’ found in [then] Rule 26(b)(2)(C) — weighing the perceived benefits against the burdens involved — may prevent discovery from being ordered.”).

comment on the relationship between proportionality and Rule 26(b)(2)(B).⁵⁹

B. Principle 2

Principle 2 provides that courts and parties should use the “proportionality standard” embodied in amended Rule 26(b)(1) and its state equivalents when assessing cost and burdens regarding preservation and production of ESI.

Comment 2.a. describes the newly amended Rule as involving a “balancing test” that requires more than consideration of just “the amount in controversy”⁶⁰ and reinforces the Rule 26(g) obligation to consider proportionality in making discovery requests, responses, and objections.⁶¹

Comment 2.b. emphasizes that proportionality considerations apply to all aspects of the discovery of ESI, including not only preservation and production, but also to searches for likely relevant ESI; reviews for relevancy, privilege, and confidentiality; preparation of privilege logs; the staging, form(s), and scheduling of production; and data delivery specifications.⁶² The Comment notes that the proportionality factors may also impact cost allocation.⁶³

Comment 2.e. distinguishes the use of a “proportionality” objection under Rule 26(b)(1) from an objection lodged to production from inaccessible sources under Rule 26(b)(2)(B).⁶⁴ It explains that a proportionality objection is different, even though some of the same cost and burden considerations apply, because if the balance of factors under Rule 26(b)(1) tips against discovery being proportional, the discovery is impermissible.⁶⁵ Rule 26(b)(1) also permits the assessment of the burden of collecting, reviewing, hosting, and producing ESI, not just the burden of accessing the ESI.⁶⁶

59. The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141 n.11 (2017) [hereinafter *Commentary on Proportionality in Electronic Discovery*] (“This *Commentary* does not address the relationship between proportionality and . . . [l]imitations . . . that apply under Federal Rule of Civil Procedure 26(b)(2)(B).”).

60. *The Sedona Principles*, *supra* note 3, at 65-66.

61. *Id.*

62. *Id.* at 67.

63. *Id.*

64. *Id.* at 69.

65. *Id.*

66. *Id.*

C. Principle 5

Principle 5 states that parties must make reasonable and good faith efforts to preserve ESI that is expected to be relevant to claims or defenses, but that it is “unreasonable to expect parties to take every conceivable step or disproportionate steps” to preserve each instance of relevant ESI.⁶⁷ By its terms, the Principle requires preservation only of “relevant” ESI, in contrast to the Second Edition, which spoke of a duty to preserve ESI which “may be” relevant.⁶⁸ Under amended Rule 26(b)(1), only non-privileged information that is “relevant to any party’s claim or defense” is discoverable.⁶⁹

Comment 5.a. notes that the change in Principle 5 in the Third Edition is intended to emphasize, as required by the 2015 amendments to the Federal Rules, that “all discovery must be proportional to the needs of the case.”⁷⁰ However, while parties may unilaterally refuse to preserve ESI if the costs and burdens of doing so are disproportionate, there is some “risk” involved if a court ultimately disagrees exercising hindsight. It advocates, as a safer course, for parties to engage in a meaningful discussion consistent with the cooperation principles and to agree on how the preservation and notice efforts may be scaled back in acknowledgment of the competing needs involved.⁷¹

Comment 5.e. notes that courts should not order “heroic or unduly burdensome” preservation, unless—applying proportionality considerations—there is a substantial likelihood that ESI (or its substantial equivalent) cannot be found in a more accessible data source.⁷² The Comment goes on to illustrate its point through a hypothetical involving backup tapes, sampling, and an illusion to the possibility of allocating costs of the recovery.⁷³ Comment 5.h. suggests that, absent good cause, preservation obligations should not extend to disaster recovery storage systems created in the ordinary course of business⁷⁴ and

67. *Id.* at 51.

68. The Sedona Conference, *The Sedona Principles, Second Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, SEDONA CONF., at ii (June 2007) [hereinafter *The Sedona Principles, Second Edition*].

69. *See, e.g.*, *Snider v. Danfoss, LLC*, 15 CV 4748, 2017 WL 2973464, at *4 (N.D. Ill. July 12, 2017) (“[There is a] lack of a need to even produce irrelevant ESI, let alone preserve it.”).

70. *The Sedona Principles*, *supra* note 3, at 95.

71. *Id.* at 96-97.

72. *Id.* at 109.

73. *Id.*

74. *Id.* at 113.

that whether ESI on backups is subject to discovery “should be determined by the usual proportionality principles.”⁷⁵

The Sedona Conference *Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, which is cross-referenced after Comment 5.a.,⁷⁶ also suggests the use of proportionality factors in pre-litigation decisions on preservation of inaccessible sources of ESI.⁷⁷

D. Principle 8

Principle 8 identifies the “primary sources” of ESI for preservation and production as those which are “readily accessible in the ordinary course.”⁷⁸ It posits these sources as the head of a continuum of less accessible sources along which parties should move until it is no longer proportional to do so.⁷⁹ This “readily accessible” continuum is intended to reflect both the “increased emphasis on proportionality under amended Rule 26(b)(1)” and “the deeper analysis” of data sources under Rule 26(b)(2)(B) that are claimed “not to be reasonably accessible.”⁸⁰

Comment 8.a. describes the primary sources of information as those which are routinely accessed in the ordinary course through ordinary means.⁸¹ Preservation or production from less accessible sources along the continuum should be required only on a showing of good cause (including a demonstration that the discovery is proportional) with the requesting party bearing the burden to show good cause on an appropriate motion.⁸²

Comment 8.b. is devoted to a discussion of Rule 26(b)(2)(B), which it describes as “related to but distinct from, the concept of proportionality.”⁸³ It points out that after the 2015 amendments, ESI that is not proportional to the needs of the case is not within the scope of discovery under Rule 26(b)(1) and that even if ESI is proportional a party

75. *Id.* at 114.

76. *Id.* at 98.

77. The Sedona Conference, *Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, 10 SEDONA CONF. J. 281, 285-94 (2009).

78. *The Sedona Principles*, *supra* note 3, at 52.

79. *Id.* (“Only when electronically stored information is not available through such primary sources should parties move down a continuum of less accessible sources until the information requested to be preserved or produced is no longer proportional.”).

80. *Id.* at 135 n.112.

81. *Id.* at 135.

82. *Id.* at 136.

83. *Id.* at 138.

may assert that it is not reasonably accessible.⁸⁴ The Comment also notes that if a party has determined that the only source of some proportional and relevant ESI is one that is not accessible, it may be required to preserve that source, but “proportionality may also dictate that costs are allocated to the requesting party when the burden to preserve or produce ESI is disproportionate to the needs of the case.”⁸⁵

E. Principle 11

In supporting the proposition that a responding party may satisfy its obligations in connection with preservation and production by using technology and process, Comment 11.a. stresses that courts should “encourage and promote” the use of technology and process to ensure that costs and burdens are “proportional to the needs of the case.”⁸⁶

F. Principle 12

Comment 12.b.iii. stresses the importance of objecting to any request for a form or forms of production a party believes is not proportional to the needs of the case and also affirmatively stating an alternative form or forms.⁸⁷ If a meet and confer is not successful in resolving the matter, it may seek a protective order under rule 26(c).⁸⁸

G. Principle 13

Principle 13 provides that the costs of preserving and producing “relevant and proportionate” ESI ordinarily should be borne by the responding party.⁸⁹ The Comments to the Principle speak of the authority to allocate such costs when the burden is undue and for good cause, under amended Rule 26(c) and emphasize the role of proportionality in determining if such requests should be granted.⁹⁰

84. *Id.* (emphasis in original).

85. *Id.* at 140. *See infra* Part IX for more information on the role of proportionality in Principle 13.

86. *Id.* at 164-68.

87. *Id.* at 182.

88. *Id.* *See infra* Part VIII for more discussion on Principle 12.

89. *The Sedona Principles*, *supra* note 3, at 52.

90. *See infra* Part IX for more information on Principle 13.

VI. SAFEGUARDING ESI

Principle 10 encourages parties to take “reasonable steps” to safeguard ESI, the disclosure of which is subject to privileges, work product protections, privacy obligations, or other legally enforceable restrictions.⁹¹

The text and Commentary were substantially revised in the Third Edition to reflect the enactment of FRE 502, as well as to emphasize the ethical obligations of counsel. It also acknowledges and advocates for the use of technology assisted review (TAR) in seeking to identify privileged information while disclaiming endorsement of its effectiveness in doing so. Additionally, it identifies emerging privacy concerns as worthy of concern.

A. Background

Given the volumes of ESI that are collected and produced in discovery, there is a substantial risk that inadvertent production of privileged or work-product ESI may “waive” that protection. Parties have historically mitigated this risk by undertaking manual review prior to production and by entering into agreements to permit post-production assertion of privilege.

The 2006 Amendments added a mechanism to facilitate this process in Rule 26(b)(5)(B) and Rule 45(e)(2) by mandating that a recipient must promptly “return, sequester, or destroy” copies when a post-production claim of privilege or “trial preparation material” is made.⁹² The Rule did not, however, address the possibility of waiver. Instead, Rules 26(f) and 16(b) encouraged parties to consider entering into voluntary agreements whereby parties agree that inadvertent production does not waive the privilege as between themselves.⁹³

However, in *Hopson v. Mayor of Baltimore*,⁹⁴ the court noted that the 2006 Amendments did not and could not eliminate the risk of “waiver or forfeiture of privilege/work product protection”⁹⁵ in jurisdictions which apply a “strict accountability” test.⁹⁶ The court suggested that parties

91. *The Sedona Principles*, *supra* note 3, at 52.

92. *See* FED. R. CIV. P. 26(b)(5)(B); FED. R. CIV. P. 45(e)(2).

93. *See* FED. R. CIV. P. 26(f) advisory committee’s notes to 2006 amendment (expressing the view that a party which receives information under such an agreement cannot “in most circumstances” assert waiver).

94. *Hopson v. Mayor and City Counsel of Baltimore*, 232 F.R.D. 228 (D. Md. 2005).

95. *Id.* at 233 (“Absent a definitive ruling on the waiver issue, no prudent party would agree to follow the procedures recommended in the [then] proposed rule.”).

96. *Id.* at 235-36.

should assume a “complete pre-production review was always required.”⁹⁷

The enactment of FRE 502 required Congressional action since it involved an evidentiary privilege,⁹⁸ which was granted.⁹⁹

B. Principle 10

Comment 10.a. advocates use of FRE 502 and its state law equivalents and Comment 10.b. outlines the protections available under it, cautioning that the Rule has important practical limitations.¹⁰⁰

Comment 10.c. suggests that parties should use court ordered agreements of a type authorized by FRE 502(d) which, if incorporated into a court order, preclude waiver of disclosed information, inadvertent or not, in the pending action and in other federal or state proceedings.¹⁰¹ Courts have ordered inclusion of a non-waiver provision in a protective order over the objection of one of the parties.¹⁰² Some courts enter blanket 502(d) orders as a matter of course.¹⁰³

This is preferable to relying solely on FRE 502(b), which precludes waiver by “inadvertent” production only if the holder “took [both] reasonable steps to prevent disclosure” and “promptly took reasonable steps to rectify the error.”¹⁰⁴ In *First Technology Capital v. JPMorgan Chase Bank*, a court found that a waiver had occurred despite FRE 502(b), since there was “hasty review and no functional measures” undertaken to keep sequestered papers separate.¹⁰⁵

97. *Id.* at 244.

98. 28 U.S.C. § 2074(b) (2012).

99. See Pub. L. No. 110-322, 122 Stat. 3537 (2008); see generally *id.* (Letter Addendum to Committee Note and Statement of Congressional Intent regarding FRE 502).

100. *The Sedona Principles*, *supra* note 3, at 147-49.

101. *Id.* at 150-51.

102. *Rajala v. McGuire Woods*, No. 08-2638-CM-DJW, 2010 WL 2949582, at *7 (D. Kan. July 22, 2010) (entering claw back order over objection which bars waiver even if the producing party “ha[s] not taken reasonable care to prevent disclosure”); see also FED. R. EVID. 502 advisory committee’s notes (“Party agreement should not be a condition of enforceability of a federal court’s order.”).

103. The Commentary cites to The Sedona Conference, *Commentary on Protection of Privileged ESI*, App. E, 17 SEDONA CONF. J. 95 (2016) for a Model Rule 502(d) Order.

104. FED. R. EVID. 502(b).

105. *First Technology Capital v. JPMorgan Chase Bank*, No. 5:12-CV-289-KSF-REW, 2013 WL 7800409, *4-5 (E.D. Ky. Dec. 10, 2013) (explaining that while the attorney “actually did turn each page” the fact that he spent only 4.1 hours on 1500 documents and missed 45 privileged documents made the court “dubious” that it was a reasonable investment of time to identify, study the author and recipients, review the subject matter, assess for privilege, gauge for exceptions, and make final decisions).

Comment 10.f. cautions that “quick peek” agreements should not be entered lightly and their use “should have the voluntary consent of the producing party.”¹⁰⁶

C. *Privilege Review*

Comment 10.g. recommends that parties consider using “search terms and . . . TAR for privilege reviews” and, if an agreement exists or confidence level is high, consider withholding that ESI without further privilege review.¹⁰⁷ After criticism of the excessive sweep of the initial draft comment during the public comment period, the Drafting Team edited Comment 10.g. “to clarify that WG1 is not taking a position on the effectiveness of . . . TAR for privilege review.”¹⁰⁸

In *Hyles v. New York City*, the court concluded that while “TAR is the best and most efficient search tool,” it “cannot, and will not, force” a party to use TAR.¹⁰⁹ The author of the opinion, who served as the Judicial Participant in the drafting of the Third Edition, also cautioned that “[t]here may come a time when TAR is so widely used that it might be unreasonable for a party to decline to use [it].”¹¹⁰

D. *Ethical Obligations*

Comment 10.i. identifies ethical obligations applicable to counsel under the ABA Model Rules of Professional Conduct, including the 2012 amendments to the Comment to Rule 1.1.¹¹¹ Comment 11.c. hints at one possible example without arguing that it is an ethical requirement.¹¹² It states that collection procedures, whether automated or manual, “must be directed and overseen by legal counsel.”¹¹³

While consistent with comments in *Zubulake v. UBS Warburg* (*Zubulake V*) about counsel’s responsibility for a client’s duty to

106. *The Sedona Principles*, *supra* note 3, at 153-56.

107. *Id.* at 156-58.

108. *Cover Letter to the Sedona Principles, Third Edition*, *supra* note 28, at 3. An expert in the field has pointed out to the author that the effectiveness is highly dependent on such considerations as to whether the TAR application is or is not capable of utilizing metadata which can be crucial to privilege reviews.

109. *Hyles v. New York City*, 10 Civ. 3119 (AT) (AJP), 2016 WL 4077114, at *3 (S.D.N.Y. Aug. 1, 2016).

110. *Id.*

111. *The Sedona Principles*, *supra* note 3, at 160-62.

112. *Id.* at 167-68.

113. *Id.*

preserve,¹¹⁴ it may sweep too broadly. In *Qualcomm v. Broadcom*, a court that initially sanctioned outside counsel for a failure to adequately oversee client collection and production subsequently vacated those sanctions after several years of discovery enabled closer attention to the dynamics of relationship between client and counsel.¹¹⁵

E. Privacy

Comment 10.j. suggests that parties should be aware of and seek to identify and protect personal privacy, trade secret, and confidential ESI from unlawful or inappropriate disclosure.¹¹⁶ It mentions recent Sedona Conference publications dealing with treatment of privacy rights in personal data.¹¹⁷

VII. SEARCH TECHNOLOGY

Principle 11 provides that a party may satisfy its good faith obligations to preserve and produce relevant ESI by the use of “technology and processes” such as sampling, searching, or the use of selection criteria.¹¹⁸

A. Background

At the time of publication of the Second Edition of the *Principles*, the iPhone had just been introduced¹¹⁹ and advanced search techniques were evolving. The potential that technological innovations can assist in discovery is now clear. The 2015 Committee Note to Rule 26(b)(1), for example, suggests that courts and parties should be willing to consider the

114. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004); *cf. In re Pfizer*, 288 F.R.D. 297, 314 (S.D.N.Y. 2013), *vacated and remanded* on other grounds, *Showers v. Pfizer, Inc. (In re Pfizer, Inc. Sec. Litig.)* 819 F.3d 642 (2d Cir. 2016) (“My research has not disclosed any Second Circuit precedent that places the duty to preserve on a party’s counsel.”).

115. *See Qualcomm v. Broadcom*, No. 05cv1958-B (BLM), 2008 WL 66932, (S.D. Cal. Jan. 7, 2008), *vacated in part* by No. 05CV1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008), *order declining to impose sanctions*, No. 05cv1958-B (BLM), 2010 WL 1336937 (S.D. Cal. Apr. 2, 2010); *see also* Thomas Y. Allman, *Achieving an Appropriate Balance: The Use of Counsel Sanctions in Connection with E-Discovery Misconduct*, 15 RICH. J. LAW & TECH. 9 (2009) (discussing the duty to take reasonable and appropriate measures to assure that client meets discovery obligations).

116. *The Sedona Principles*, *supra* note 3, at 163-64 cmt. 10.j.

117. Reference is made to The Sedona Conference, *Practical In-House Approaches to Cross-Border Discovery & Data Protection*, 17 SEDONA CONF. J. 397 (2016) and to The Sedona Conference, *Commentary on Privacy and Information Security: Principles and Guidelines for Lawyers, Law Firms, and Other Legal Service Providers*, 17 SEDONA CONF. J. 1 (2016).

118. *The Sedona Principles*, *supra* note 3, at 52.

119. *Id.* at 62 n.32.

opportunities for reducing the burden or expense of discovery as “reliable means” of “computer-based” methods of search become available.¹²⁰

B. Principle 11

Principle 11 refers to the use of “technology and processes” instead of the earlier reference to “electronic tools and processes” as used in the Second Edition.¹²¹

Comment 11.a. argues that the use of technology in the search for relevant ESI is reasonable and can create cost and time savings.¹²² It states no preferences for the type of technology, but does note in a footnote that it may be more useful to employ TAR in investigations and litigation in culling information than “more traditional search terms.”¹²³ In contrast, in cases involving a specific patent design, search terms may be “perfectly adequate.”¹²⁴

No cross-reference is made to the discussion in Comment 10.g., which suggests that parties should consider the use of TAR in privilege reviews. However, the Sedona Conference has released a comprehensive *TAR Case Law Primer*,¹²⁵ which courts have found useful in deciding the appropriate sequencing of keyword searches and predictive coding.¹²⁶

Comment 11.a. suggests, citing the *Commentary on Proportionality in Electronic Discovery*, that parties should be prepared to explain their choice of search methods absent agreement when there are “perceived deficiencies” and should ensure that costs and burdens are proportional to the needs of the case.¹²⁷ Comment 11.b. supports the use of sampling to help narrow the search and references the *Sedona Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*.¹²⁸

120. FED. R. CIV. P. 26(b)(1).

121. *The Sedona Principles*, *supra* note 3, at 52; *cf. with The Sedona Principles, Second Edition*, *supra* note 68, at ii.

122. *The Sedona Principles*, *supra* note 3, at 164-66.

123. *Id.*

124. *Id.* at 165 n.132.

125. The Sedona Conference, *TAR Case Law Primer*, 18 SEDONA CONF. J. 1 (2017).

126. *See, e.g.*, FCA U.S. LLC v. Cummins, No. 16-12883, 2017 WL 2806896 (E.D. Mich. Mar. 28, 2017) (relying on the Sedona TAR Case Law Primer in concluding that applying TAR to the universe of electronic material before any keyword searches is the preferred method of reducing the universe of material).

127. *Commentary on Proportionality in Electronic Discovery*, *supra* note 59.

128. The Sedona Conference, *Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 15 SEDONA CONF. J. 217 (2014).

VIII. FORM OF PRODUCTION

Principle 12 provides that production of ESI “should be made in the form or forms in which it is ordinarily maintained or that is reasonably useable given the nature of the [ESI] and the proportional needs of the case.”¹²⁹ This is a substantial clarification of what turned out to be an unnecessarily complex statement of the Principle in the Second Edition.

A. *Background*

As part of the 2006 Amendments, Rule 34(b)(E)(ii) was added to provide that in the absence of an agreement or court order, ESI should be produced, as a default matter, “in the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.”¹³⁰ Rule 34(b)(B)-(d) outlines a process of identification and counter-identification of preferred form or forms while placing no initial burden on the requesting party to make a choice, but permitting any choices it made to govern in the absence of objection by the producing party.¹³¹

The Second Edition version of Principle 12, picking up on a relatively modest observation in the 2006 Committee Note to Rule 34, suggested that courts should take into account the need to produce reasonably accessible metadata that would enable the receiving party to have the “same ability to access, search, and display the information as the producing party.”¹³²

Unfortunately, some courts interpreted this comment to suggest that native production was necessary in all cases.¹³³ As the Overview of Main Changes Between the Second and Third Edition (Overview of Main Changes) section to the Third Edition explains, however, only some ESI and some metadata may be needed to render the ESI as produced reasonably usable.¹³⁴ This was not adequately explained in the Comments to the Second Edition.¹³⁵

129. *The Sedona Principles*, *supra* note 3, at 52.

130. FED. R. CIV. P. 34(b)(E)(ii).

131. FED. R. CIV. P. 34(b)-(d).

132. *The Sedona Principles, Second Edition*, *supra* note 68, at ii.

133. *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 108 (E.D. Pa. 2010) (“Plaintiffs were entitled to . . . [ESI] in native format with their associated metadata.”).

134. *The Sedona Principles*, *supra* note 3, at 46 (“ESI relevant to a matter may reside in an enormously complex system, of which only some ESI and some metadata is relevant to the case or needed to render the ESI produced reasonably usable.”).

135. *Id.* at 46-48. In contrast, the Third Edition covers the same topic by providing what is essentially a mini-treatise on the topic which is accurate, easy to read, and very practical.

B. Principle 12

Principle 12 in the Third Edition provides that production should be made in the default form or forms of production identified in Rule 34(b)(E)(ii) given the nature of ESI and the proportional needs of the case.¹³⁶

Comment 12.b. stresses that parties should agree on the form or forms for production early, as recommended in both Principles 3 and 4 and by Rule 26(f).¹³⁷ However, absent such agreement, ESI may be produced in a form that is reasonably usable. It need not be produced in its native format, since there are other ways to give the party the ability to access and search it and make it reasonably useable.

As the Comment explains, the most common form of production, for more than a decade, has been to create a static electronic image in Tagged Image File Format (TIFF) or Adobe Portable Document (PDF), place the extracted text from the document into a text file, and place the selected metadata and other non-apparent data into one or more separate load files.¹³⁸ This is frequently referred to as “TIFF, Text and Load Files” or “TIFF+.”

In *Aguilar v. ICE*, the court noted that appropriate search functionality could be achieved by producing memoranda, emails, and electronic records in PDF or TIFF format accompanied by a load file containing searchable text and selected metadata.¹³⁹

Comment 12.b. stresses that parties should not demand forms of production, including native files and metadata fields “for which they have no practical use or that do not materially aid in the discovery process,” since “TIFF+ is ‘a reasonably usable’ form of production for most purposes and types of ESI.”¹⁴⁰ There must be a “demonstrably reasonable need” before native production is required.¹⁴¹

Comment 12.b.i. acknowledges that some courts have ruled that production of static electronic images without text and load files is not reasonably usable and is therefore impermissible under Rule 34(b)(2)(E)(ii).¹⁴² However, it explains that a requesting party need not be

136. *Id.* at 46.

137. *See id.* at 79-87. Comment 4.a. suggests that requesting parties should include technical details about particular field or types of metadata sought, and be prepared to explain its preferences at a meet and confer. Comment 3.c. suggests that parties should be prepared to discuss “data delivery specifications” such as necessary metadata fields, load files, text extraction, redactions, de-duplication, and exception handlings.

138. *Id.* at 172.

139. *Aguilar v. ICE*, 255 F.R.D. 350, 356 (S.D.N.Y. 2008).

140. *The Sedona Principles*, *supra* note 3, at 171-74.

141. *Id.* at 174-77.

142. *Id.* at 174-76.

able to access the data in the same matter in which a responding party can access or search its own data in the ordinary course of conducting its business. The “same ability” requirement in the 2006 Committee Note, properly understood, refers to the context of prosecuting and defending the claims and defenses at issue, not how it is used in the business operations of the producing party; it depends on the type of ESI involved and the needs of the case.¹⁴³

Comment 12.b.ii. also explains that while it may be appropriate to produce certain types of ESI in native format—such as spreadsheets, portable database files, audio/video files, and, on occasion, even presentation files—there can be serious disadvantages from the lack of page-level Bates numbering and the need for equipment or expertise to use such applications.¹⁴⁴ It provides useful illustrations of how partial native format file production can be accomplished.

An important consideration, of course, is the proportionality of the effort involved. The Supreme Court of Texas in *State Farm Lloyds* has noted that that courts should exercise their discretion, which exists absent agreement, to choose among the alternative forms that are most useful in the context, with “proportionality [a]s the polestar.”¹⁴⁵

Comment 12.b.ii. addresses the need to take extraordinary preservation measures, such as preserving hard drive or system logs when it is reasonably foreseeable that unique information—likely to be material to the claims or defenses—is involved.¹⁴⁶

C. *Labeling Responses*

The production of ESI is exempt from the requirement under Rule 34(b)(2)(E)(i) that production of *documents* must be labeled to correspond to categories in the request.¹⁴⁷ Among other reasons, production of common metadata and source fields in a load file in accordance with subsection (ii) should suffice to permit the requesting party to sort and filter the materials to determine how the materials were kept.¹⁴⁸

143. *Id.* at 174-175 (discussing how the Sedona Conference drafters moved beyond restating the then-current FED. R. CIV. P. 34(b)).

144. *The Sedona Principles*, *supra* note 3, at 177-78.

145. *In re State Farm Lloyds*, 520 S.W.3d 595, 615 (Tex. 2017) (applying federal proportionality principles because they are consistent with and determinative of similar Texas limiting principles).

146. *The Sedona Principles*, *supra* note 3, at 177-80.

147. *Id.* at 182-84.

148. *See, e.g., Anderson Living Trust v. WPX Energy Prod.*, 298 F.R.D 514, 527 (D.N.M. 2014) (“[P]arties are entitled to the guarantees of (E)(i) or (E)(ii), but not both.”).

IX. COST ALLOCATION

Principle 13 states that “[t]he costs of preserving and producing relevant and proportionate electronically stored information ordinarily should be borne by the responding party.”¹⁴⁹ As was the case with Principle 12, this is a substantial change from the version of Principle 13 that appeared in the Second Edition.

A. *Background*

Although parties presumptively bear their own costs of discovery, courts have long acknowledged the authority of courts to deal with undue burdens and expense in the course of discovery by shifting costs.¹⁵⁰ In *Zubulake v. UBS Warburg (Zubulake I)*, for example, the court explained that Rule 26(c), when coupled with the proportionality test of Rule 26(b), permitted it to consider cost-shifting of electronic discovery for production from storage media such as backup tapes containing ESI which were not reasonably accessible.¹⁵¹ It also formulated a seven factor test for courts to use in making that assessment.¹⁵²

Rule 26(b)(2)(B), adopted as part of the 2006 Amendments, provides that when a party is ordered to produce ESI from an inaccessible source for good cause the court “may specify conditions for the discovery.”¹⁵³ The 2006 Committee Note explained that this could “include payment by the requesting party of part or all of the costs of obtaining information.”¹⁵⁴ However, this approach can be cumbersome in execution, given that it cannot be considered without first showing that the ESI is inaccessible and is followed by a demonstration that good cause exists to order production, which involves consideration of proportionality issues.

As part of the 2015 Amendments, changes were made to Rule 26(c) to acknowledge that a court may specify “the allocation of expenses” as necessary to deal with “undue burden or expense.”¹⁵⁵ The Committee

149. *The Sedona Principles*, *supra* note 3, at 53.

150. *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 358 (1978) (“Under [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests, but he may invoke the district court’s discretion under Rule 26(c) to grant orders protecting him from ‘undue burden or expense’ in doing so, including orders conditioning discovery on the requesting party’s payment of the costs of discovery.”).

151. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) (“[W]hether production of documents is unduly burdensome or expensive turns primarily on whether it is kept in an *accessible* or *inaccessible* format.”).

152. *Id.* at 70.

153. FED. R. CIV. P. 26(b)(2)(B).

154. Committee Note, reproduced at 234 F.R.D. 219, 335 (2006).

155. FED. R. CIV. P. 26(c)(1)(B).

Note explains that while authority to do so already exists, its explicit recognition in the rule clarifies its availability without implying that cost-shifting “should become a common practice.”¹⁵⁶

The availability of this more straightforward “allocation” process has meant that courts may rely on the authority of Rule 26(c), not Rule 26(b)(2)(B), while still employing a variant of the multi-factor cost-shifting test from *Zubulake I* invoking proportionality considerations¹⁵⁷ to determine if allocation of costs of producing ESI is appropriate.¹⁵⁸ This is available even when the technical attributes forming barriers to production do not create the requisite lack of accessibility to qualify under Rule 26(b)(2)(B).¹⁵⁹

B. Principle 13

Principle 13 in the Second Edition provided—in terminology inspired by Rule 26(b)(2)(B)—that the responding party should bear the reasonable costs of retrieving and reviewing ESI, unless it was not reasonably available in the ordinary course of business, in which case those costs could be shared or shifted.¹⁶⁰ This caveat has been dropped from the Third Edition, which simply provides that the costs of producing and preserving “relevant and proportionate” ESI should ordinarily be borne by the producing party.¹⁶¹

Principle 13 pointedly ignores the cost-shifting authority available under Rule 26(b)(2)(B) in favor of the use of Rule 26(c) for that purpose. According to the Overview of the Main Changes section of the *Principles*,

156. Committee Note, reproduced at 305 F.R.D. 457, 556 (2015) (“Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Court and parties should continue to assume that a responding party ordinarily bears the costs of responding.”).

157. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003) (listing seven factors).

158. See *North Shore-Long Island Jewish Health Sys. v. Multiplan, Inc.*, 2018 WL 1515711, at *12-15 (E.D.N.Y. Mar. 28, 2018).

159. See, e.g., *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 300 (S.D.N.Y. 2012) (explaining that databases did not qualify as not reasonably accessible because the costs and burdens of production were not associated with some “technological feature that inhibits accessibility”).

160. *The Sedona Principles, Second Edition*, *supra* note 68, at ii. (“Absent a specific objection, party agreement or court order, the reasonable costs of retrieving and reviewing electronically stored information should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information may be shared by or shifted to the requesting party.”).

161. *The Sedona Principles*, *supra* note 3, at 53.

Principle 13 has been “updated” to reflect the Federal Rules’ treatment of cost allocation and its interplay with the proportionality analysis under Rule 26(b).¹⁶²

Comment 13.a. states that “[i]f the result of the proportionality analysis clearly demonstrates that the requested discovery is appropriately proportional, the discovery should be allowed with the presumption that costs will not be allocated among the parties. Conversely, if the result of the proportionality analysis clearly demonstrates that the requested discovery is not proportional, and the request is not within the permissible scope of discovery, the request should be denied and cost allocation would not apply.”¹⁶³ The Comment suggests that only if the results of a proportionality analysis are not clear cut does the court retain discretion to allocate some or all of the costs to the requesting party.¹⁶⁴

Comment 13.a. also lists six factors for use in determining if allocation should be made under those circumstances, based on a restatement of the *Zubulake* factors, with one exception.¹⁶⁵ The Comment acknowledges that while certain of the listed factors also bear on the proportionality analysis, they are “intended to be weighed separately” in determining if cost allocation is appropriate.¹⁶⁶

Comment 13.c. emphasizes that when disproportionate demands or requests are made, the courts should deny the discovery, not order it to take place with cost-allocation, providing illustrations of possible results involving backup tapes which depend on the degree of burden balanced by the likelihood of finding unique ESI not available elsewhere.¹⁶⁷

Comment 13.b. suggests that the costs of *preservation* of ESI should be allocated only in “extraordinary circumstances.”¹⁶⁸ It appropriately stresses that courts should also discourage burdensome preservation demands that have no reasonable prospect of producing material assistance to the fact finder.¹⁶⁹

162. *Id.* at 48 (ignoring Rule 26(b)(2)(B) authority but also not rejecting its continued viability as an alternative source of authority for cost-shifting).

163. *Id.* at 188

164. *Id.* (“If, however, the result of the proportionality analysis is not clear cut, the court has discretion to allocate some or all of the costs to the requesting party. *See* Principle 8.”).

165. *Compare* *Zubulake v. UBS Warburg LLC*, 217 F.R.D 309, 322 (S.D.N.Y. 2003), with *The Sedona Principles*, *supra* note 3, at 187 cmt. 13.a. (adopting six of the *Zubulake* factors essentially verbatim, with the exception of “[t]he relative benefits to the parties of obtaining the information”).

166. *The Sedona Principles*, *supra* note 3, at 188-89.

167. *Id.* at 190.

168. *Id.* at 189.

169. *Id.*

X. SPOILIATION

Principle 14 has been materially revised to provide that a court may address a breach of duty to preserve ESI by “remedial measures, sanctions, or both” and while remedial measures are “appropriate to cure prejudice,” the use of sanctions “are appropriate only if a party acted with intent to deprive another party of the use of relevant ESI.”¹⁷⁰ According to the Overview of the Main Changes section of the *Principles*, Principle 14 has been “revised to reflect evolving case law and the 2015 amendment to Rule 37(e). . . .”¹⁷¹

A. *Background*

Prior to the 2006 Amendments, the Federal Rules did not address the common law duty to preserve, nor did it provide measures for its breach. Federal courts largely relied upon their inherent authority to deal with spoliation, which led to the various circuits evolving rules that were not consistent, especially in assessing the degree of culpability sufficient to sustain an adverse inference as to the contents of missing evidence.

For example, the Second Circuit held in *Residential Funding v. DeGeorge Financial Corp.* that a negligent failure to preserve ESI was sufficient to justify an inference that the missing information was adverse to the non-moving party.¹⁷² Other circuits disagreed.¹⁷³

As part of the 2006 Amendments, Rule 37(f), subsequently renumbered as Rule 37(e), made a largely ineffectual attempt to bring uniformity to spoliation of ESI by prohibiting rule-based sanctions for losses of ESI due to routine, good faith operations of information systems.¹⁷⁴ However, since it governed only rule-based sanctions, courts simply ignored the Rule by relying on their inherent authority.

Subsequently, when the Rules Committee revisited the issue after the 2010 Duke Litigation Conference, it focused on providing authority for measures for the loss of ESI—which should have been preserved—and

170. *Id.* at 53 (“The breach of a duty to preserve electronically store information may be addressed by remedial measures, sanctions, or both: remedial measures are appropriate to cure prejudice; sanctions are appropriate only if a party acted with intent to deprive another party of the use of relevant electronically stored information.”).

171. *Id.* at 49 (noting that since the revised Principle is intended to provide guidance, not serve as a restatement, it varies in certain respects from the amended Rule).

172. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002).

173. *See, e.g., Aramburu v. Boeing*, 112 F.3d 1398, 1407 (10th Cir. 1997) (“Mere negligence . . . is not enough because it does not support an inference of consciousness of a weak case.”); *accord* MCCORMICK ON EVIDENCE § 273 at 660-61 (1972).

174. FED. R. CIV. P. 37(e).

specifying the degree of culpability required for harsh measures. The Sedona Conference suggested adoption of a uniform standard of culpability requiring that a party must have “acted with ‘specific intent’ to deprive an opposing party of material evidence.”¹⁷⁵

Amended Rule 37(e) reflects that Sedona Conference suggestion. It requires a showing of an “intent to deprive another party of the information’s use in the litigation” before such measures may be imposed for breach of a duty to preserve.¹⁷⁶ This has had a substantial clarifying impact,¹⁷⁷ although some courts have ignored the requirement.¹⁷⁸

B. Principle 14

In the Second Edition, the Comments to Principle 14 made it clear that in the Sedona Conference’s view an unintentional destruction of relevant ESI was not sufficient to justify sanctions.¹⁷⁹

Principle 14 in the Third Edition has therefore adopted the “intent to deprive” culpability requirement of amended Rule 37(e) because it is “aligned” with the previously articulated views of WG1.¹⁸⁰

Comment 14.b. provides that a party must show that the ESI: (1) should have been preserved, (2) has been lost because the party failed to take reasonable steps to preserve, and (3) cannot be restored or replaced by additional discovery.¹⁸¹ As the Comment puts it, no remedy is available if a party had no duty to preserve, if the relevant ESI is still available, or if the relevant ESI was lost despite the party having taken reasonable steps to preserve.¹⁸²

175. Letter from Kenneth J. Withers (on behalf of SG1 Steering Committee), (Nov. 26, 2013) at 13. The written comments, including that of the Sedona Conference, are archived at, <http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002>.

176. FED R. CIV. P. 37(e); see also Thomas Y. Allman, *What’s New and What’s Next for Spoliation*, 101, 2, JUDICATURE 47 (2017), https://law.duke.edu/sites/default/files/centers/judicialstudies/judicature/may2017_rule37.pdf [<http://perma.cc/2G86-689E>].

177. Thomas Y. Allman, *Amended Rule 37(e): Case Summaries*, (May 27, 2017), App. A, <https://law.duke.edu/sites/default/files/centers/judicialstudies/judicature/2017rule37etodaycasesummaries.pdf> [<http://perma.cc/47XB-FR9L>].

178. *Id.* at App. B (noting at requests for adverse inferences which would apparently have been denied had the Rule been applied).

179. *The Sedona Principles, Second Edition*, *supra* note 68, at 70 cmt. 14.a. (“[N]either spoliation findings nor sanctions should issue without proof of a knowing violation of an established duty to preserve or produce electronically stored information or a reckless disregard amount to gross negligence.”).

180. *The Sedona Principles*, *supra* note 3, at 193-94 cmt. 14.a. (“Having clarified that unintentional destruction of relevant ESI is not sufficient to trigger the imposition of spoliation sanctions, Rule 37(e) is now aligned in that respect with The Sedona Principles.”).

181. *Id.* at 194 cmt. 14.b.

182. *Id.*

Compliance with the “reasonable steps” requirement is often accomplished by notification of persons likely to have relevant information as well as those in control of other sources of relevant ESI.¹⁸³ This may involve use of a “legal hold notice” as discussed in the *Commentary on Legal Holds: The Trigger & The Process*.¹⁸⁴

As noted in that Commentary, the notice should be conveyed in “an appropriate form, which may be written.”¹⁸⁵ It is not the case, as was suggested in *Pension Committee*, subsequently abrogated in *Chin v. Port Authority*, that a failure to use a litigation hold alone justifies spoliation sanctions.¹⁸⁶ The court in *Bouchard v. USTA*, for example, noted that the absence of a litigation hold was not dispositive because the party had otherwise complied with its preservation obligations.¹⁸⁷

C. Measures Available

Remedial measures, as described in Comment 14.c., are available to redress prejudice, provided that they are no greater than necessary to do so.¹⁸⁸ The Comment stresses that they should not be applied in order to punish nor should they put the party that lost the relevant ESI in a better position than it would have been if the lost relevant ESI had been produced.¹⁸⁹

Comment 14.d. explains that sanctions are appropriate only upon a showing of “intent to deprive.”¹⁹⁰ Only an intentional loss or destruction of evidence logically gives rise to an inference that the evidence was unfavorable to the party responsible for its loss.¹⁹¹

Comment 14.d. asserts that Principle 14 differs from Rule 37(e) in respect to treatment of the “incompetent spoliator,” giving as an example a required payment of a fine to the court to deter future behavior where

183. *Id.* at 101-03 cmt. 5.c.

184. *Commentary on Legal Holds*, *supra* note 52, at 271-74.

185. *Id.* at 282-83 (noting that while use of a written legal hold is often appropriate, it is simply one method of executing preservation obligations, not the only one).

186. *Chin v. Port Authority*, 685 F.3d 135, 162 (2d Cir. 2012), *abrogated by* *Pension Comm. v. Banc of America*, 685 F.Supp.2d 456, 471 (S.D.N.Y. 2010) (“rejecting” the “notion” that a failure to institute a litigation hold constitutes negligence per se).

187. *Bouchard v. USTA*, 15 Civ. 5920 (AMD) (LB), 2017 WL 3868801, at *2 (E.D. N.Y. Sept. 5, 2017) (concluding that the responding parties “fully complied” with their preservation obligation by preserving the relevant videotaped footage).

188. *The Sedona Principles*, *supra* note 3, at 195-96.

189. *Id.*

190. *Id.* at 196.

191. *Id.* at 196-97.

there is an intent to deprive, but no irretrievable loss.¹⁹² However, while it is true that remedies are not available under Rule 37(e) merely because a party acts with reprehensible intent,¹⁹³ that does not necessarily exclude the exercise of a court's inherent powers to deal firmly with a party under similar circumstances.¹⁹⁴

XI. CONCLUSION

The Third Edition of the *Principles* is a worthy successor to the Second Edition and, in many respects, a substantial improvement, reflecting both the passage of time and the clarification of the underlying *Principles*. The drafting team for the Third Edition had the advantage of understanding the actual evolution in technology and the law since the Second Edition was published, and have solidly built on that knowledge.

The contents of the Third Edition are, on balance, respectful of the legitimate needs of all participants in the electronic discovery process and should be flexible enough to adjust to the inevitable and unpredictable changes ahead.

192. *Id.* at 197 cmt. 14.d. (giving an illustration of when a court might impose sanctions “[u]nder the concepts of this Principle 14 (but not Rule 37(e))”).

193. The Standing Committee deleted the statement that “there may be rare cases where a court concludes that a party’s conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice.” Minutes, Standing Comm. Mtg., (May 29-30, 2014), at n.2.

194. See *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 145 (2d Cir. 2012) (imposing sanctions for bad-faith conduct under inherent authority since the focus is on the “purpose rather than the effect”).

XII. APPENDIX: THE SEDONA PRINCIPLES

(THIRD EDITION)

1. Electronically stored information is generally subject to the same preservation and discovery requirements as other relevant information.
2. When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(1) and in state equivalents, which requires consideration of the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefits.
3. As soon as practicable, parties should confer and seek to reach agreement regarding the preservation and production of electronically stored information.
4. Discovery requests for electronically stored information should be as specific as possible; responses and objections to discovery should disclose the scope and limits of the production.
5. The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that is expected to be relevant to claims or defenses in reasonably anticipated or pending litigation. However, it is unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant electronically stored information.
6. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.
7. The requesting party has the burden on a motion to compel to show that the responding party's steps to preserve and produce relevant electronically stored information were inadequate.
8. The primary sources of electronically stored information to be preserved and produced should be those readily accessible in the ordinary course. Only when electronically

stored information is not available through such primary sources should parties move down a continuum of less accessible sources until the information requested to be preserved or produced is no longer proportional.

9. Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information.
10. Parties should take reasonable steps to safeguard electronically stored information, the disclosure or dissemination of which is subject to privileges, work product protections, privacy obligations or other legally enforceable restrictions.
11. A responding party may satisfy its good faith obligations to preserve and produce relevant electronically stored information by using technology and processes, such as sampling, searching, or the use of selection criteria.
12. The production of electronically stored information should be made in the form or forms in which it is ordinarily maintained or that is reasonably usable given the nature of the electronically stored information and the proportional needs of the case.
13. The costs of preserving and producing relevant and proportionate electronically stored information ordinarily should be borne by the responding party.
14. The breach of a duty to preserve electronically stored information may be addressed by remedial measures, sanctions, or both: remedial measures are appropriate to cure prejudice; sanctions are appropriate only if a party acted with intent to deprive another party of the use of relevant electronically stored information.